

Determinations of Maltreatment and Maltreaters in Cases of Alleged Child Abuse or Neglect

***** Draft 8 – January 2006 *****

This document outlines policy and offers guidance when making case finding determinations as required in sec. 48.981(3)(c)4., Stats. The term “maltreatment” or “child maltreatment” in this document refers to child abuse, as defined in sec. 48.02(1) and (14g), Stats., and child neglect, as defined in sec. 48.981(1)(d), Stats.

Purpose for Making Maltreatment Determinations

The maltreatment determination is made as part of the county agency's process in determining who may need services. Section 48.981(3)(c)7. states: "...The county department shall coordinate the development and provision of services to abused and neglected children and to families where abuse or neglect has occurred or to children and families where circumstances justify a belief that abuse or neglect will occur."

I. Statutory Requirements in Making Determinations of Maltreatment

Per Wisconsin statutes, "The county department shall determine, within 60 days after receipt of a report, whether abuse or neglect has occurred or is likely to occur. The determination shall be based on a preponderance of the evidence produced by the investigation." [Ref. s. 48.981(3)(c)4.]

Although Wisconsin statutes require that a determination be made as to whether child abuse has occurred or is likely to occur, the statutes do not require that a determination be made that a particular person has maltreated the child.

II. Maltreatment and Maltreater Determinations Defined

The term maltreatment determination refers to the CPS agency's conclusion as to whether abuse or neglect or unborn child abuse has occurred. It includes, as a type of general neglect, acts or conditions which create an imminent risk of serious harm to a child.

1. Maltreatment Determination:

The maltreatment determination is a conclusion drawn as to whether abuse or neglect or unborn child abuse has occurred. It is required by statute and must be made for all reports screened in for an initial assessment/investigation under s.48.981, Stats.

- A maltreatment determination is required for each of the following types of child maltreatment identified in a particular case/family: physical abuse, sexual abuse, neglect, and emotional damage.
- A maltreatment determination is also required for reports of unborn child abuse.

- A maltreatment determination is required for each type of maltreatment alleged in the report as well as any additional form of maltreatment that is identified during the course of the initial assessment/investigation, if applicable.

2. Maltreater Determination:

A maltreater determination is a conclusion that a specific person abused or neglected a child. It is not required by statute but is recognized by statute as occurring and when made, is subject to the appeal right under s.48.981(3)(c)5m., Stats. Section VII describes when a maltreater determination may be made.

Wisconsin statutes reference making a determination as to whether abuse or neglect has occurred or is likely to occur [Sec. 48.981(3)(c)4, Stats.]. In cases of alleged maltreatment or complicity in maltreatment by Primary Caregivers, the agency always makes two decisions that are a judgment about whether abuse or neglect is likely to occur:

- the safety assessment and the determination that a child is safe or unsafe,
- the risk assessment and the determination of a certain level of risk in a family

In some cases, the agency also substantiates that there was or is an identified lack of necessary care that seriously endangers the physical health of a child, i.e. a prediction of future harm that is also a substantiation of neglect.

The statutory definition of neglect does not require that the child already have suffered serious physical harm. It includes a judgment about whether the lack of necessary care identified seriously endangers the physical health of the child, which is a prediction of future harm. Therefore, an act or failure to act on the part of a parent, guardian, legal custodian or other person exercising temporary or permanent control over a child that placed a child at imminent threat of serious physical harm, regardless of whether that harm occurred, is neglect.

Decisions about whether abuse or neglect is likely to occur in the future are made when the CPS worker completes two specific assessments: a risk assessment and a safety assessment. Risk is assessed on a continuum of low risk to high risk. Safety is assessed in absolute terms, i.e., a child is either safe or unsafe (in imminent danger of severe harm). The completion of both assessments provides a comprehensive determination about the likelihood of future child abuse or neglect.

If a child is determined to be unsafe (i.e., in imminent danger of serious physical harm), and the family refuses to work with the agency to address the behaviors and conditions making the child unsafe, the agency may petition the court under s.48.13(10), Stats.

III. Evidentiary Standard for Determinations of Maltreatment and Maltreaters

These determinations must be based on a “preponderance of the evidence” produced by the investigation/assessment process. [Ref. s.48.981(3)(c)4., Stats.]. (See *Initial Assessment Appendix 1: Substantiating the Different Types of Maltreatment*)

IV. Maltreatment Determination Terminology

The maltreatment determination terminology which shall be used for allegations that abuse or neglect or unborn child abuse has occurred is the following:

Substantiated

There is a preponderance of the evidence that abuse or neglect occurred

Unsubstantiated

There is not a preponderance of the evidence that abuse or neglect occurred **or** evidence gathered lends weight to the belief that abuse or neglect did not occur

Unsubstantiated/ Critical Sources of Information Are Not Available

The agency was unable to access critical sources of information; therefore, the agency cannot determine that there is a preponderance of the evidence that abuse or neglect or unborn child abuse occurred.

Unsubstantiated/Critical Sources of Information Are Not Available

This conclusion should only be reached if critical sources of information, such as the parent and child, necessary to completing the initial assessment/investigation and gathering a preponderance of evidence cannot be accessed or located.

V. Criteria for Substantiating Child Maltreatment or Unborn Child Abuse

The following criteria must be met in order to substantiate that maltreatment has occurred:

- There is a preponderance of the evidence, based on credible information, that **every** element of the definition of the specific type of maltreatment or of unborn child abuse has been met. (See Initial Assessment Appendix 1 for a listing of every element of each type of maltreatment. The required elements to substantiate maltreatment are boxed.)

Additional Requirements in reports of child abuse or neglect:

- "...In making a determination that emotional damage has occurred, the county department shall give due regard to the culture of the subjects...". [Ref. s. 48.981(3)(c)4.]
- "A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent, guardian or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child." [Ref. s. 48.981(3)(c)4., Stats.]

Information gathered should be understood within its cultural context. For example, a number of American Indian people have an extended family system of child rearing. Many adults take an interest in the children's well-being and different adults take responsibility for different aspects of the parenting role. In this context, it would be erroneous to conclude that the parents are not

fulfilling their role and are being neglectful. Traditional home cures used by many Hmong are another example. They include gentle pinching, cupping or coining and can leave bruises on the skin. The bruising is typically neither severe nor frequent and therefore is not physical abuse.

VI. Criteria for Substantiating a Specific Person as a Maltreater

The CPS agency only makes a determination that a specific person has maltreated a child when:

- maltreatment has been substantiated by a preponderance of the evidence, **and**
- the following persons were interviewed by CPS:
 1. the child (if the child is too young to be interviewed, the child must be observed) [Note: this interview can be conducted in accordance with a working agreement between CPS, law enforcement or an advocacy center], **and**
 2. at least one parent, **and**
 3. the alleged maltreater, who must be advised of the allegations and given an opportunity to refute or explain the allegations, **or** CPS made a significant effort to interview the alleged maltreater and that person refused to be interviewed, **and**
- there is a preponderance of the evidence that the child was maltreated by the particular person identified (See *Initial Assessment Appendix 2: Considerations In Maltreater Determination*)

VII. Documentation

The following must be documented in the family case record:

1. The Maltreatment determination which includes:
 - the type or types of maltreatment that have been substantiated, and
 - the child or children who were the victims of the maltreatment, except in reports of alleged unborn child abuse.
2. The rationale for the Maltreatment determination which must describe either:
 - how the preponderance of the evidence standard was met to support a *Substantiated* decision, or
 - how the preponderance of the evidence standard was not met, supporting the *Unsubstantiated* decision, or
 - why the agency was unable to locate the principles of the report or unable to gain access to them to conduct the assessment, supporting the *Unsubstantiated/Critical Sources of Information Are Not Available* decision.

In cases where a Maltreater determination has been made, the following must also be documented in the family case record:

- the person or persons the agency determined maltreated the child(ren)

- how the preponderance of the evidence standard was met to support a *Substantiated* decision that the person maltreated the child(ren).

Conclusions in both the narrative and data tracking portions of the family case record must be consistent.

If the narrative portion of the family case record contains the conclusion by the agency that a particular person has maltreated the child(ren), the record must reflect this conclusion in the data tracking portions of the family case record.

The CPS record may reference information from other reports. Any conclusions that might be present in reports by other entities, (i.e. law enforcement) are made in accordance with the policies and professional protocols of those systems. They do not substitute for the agency's documentation of its conclusion regarding VII. of this policy. This is especially important in cases of maltreatment by non-caregivers and some secondary caregivers, where the CPS agency may want to reference information from a police investigation when discussing protection and service needs with a parent, yet still not make an agency conclusion about who the maltreater is.

Impact of Appeals on Determination of Maltreatment and Maltreaters

A person substantiated as having maltreated a child may appeal that decision. Both the Maltreatment determination and the Maltreater determination may be reversed by an appeal. In some cases, the Maltreater determination can be reversed, but the Maltreatment determination upheld.

VIII. Documentation of an Overturned Determination of Maltreatment or Maltreater Due to an Appeal

When the agency's determination of maltreatment or maltreater is appealed and overturned, the following must occur:

- The result of the appeal decision must be documented in the family case record within five working days from when the agency receives notice of the decision. The agency's original determinations are not purged; rather they are supplemented and overridden by the result of the appeal decision.
- Any record keeping that creates or has the capacity to create a listing of persons substantiated as a maltreater must be modified to assure that the person's name will not appear on any such listing.

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INITIAL ASSESSMENT APPENDIX 1

Substantiating the Different Types of Maltreatment

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I

Preponderance of the Evidence

The term *preponderance of the evidence* is referenced only once in the child abuse reporting law. It is found under s. 48.981(3)(c)4., Stats. and is presented in the context of identifying the level of proof under which the county department social worker should conclude that child abuse or neglect has occurred.

The term *preponderance of the evidence* is the level of proof which, as a whole, shows that the fact sought to be proved is more probable than not. It is that level of proof or persuasion which is more credible and convincing to the mind. The term then might be defined as the *amount of proof which would allow an individual to conclude that the existence of abuse or neglect is more probable to have occurred than not*.

The only definition for *preponderance of the evidence* as used in Ch. 48, Stats., is found in case law. In the case In Interest of T.M.S., the appellate court specifically stated, "It requires that the fact finder must be satisfied to a reasonable certainty by the greater weight of the credible evidence".

In applying this standard, the worker considers two issues:

- 1) *Whether the evidence gathered and reviewed by the social worker is **credible***. Credible evidence is defined as evidence which is trustworthy, believable or dependable. The opposite would include evidence which is doubtful, unreliable or untrustworthy. For example, a written medical report reviewed by a social worker is credible evidence. The credibility of this report would substantially diminish if the contents of a medical report were read to the social worker over the phone by an unknown person. Therefore, in applying this standard, the social worker must be satisfied that the evidence being reviewed has indicators of being trustworthy. The ultimate question for the social worker which addresses the trustworthiness or reliability of the evidence is, "What about this information makes it credible or reliable?"
- 2) *Whether the evidence gathered and reviewed by the worker is **persuasive***. Once the trustworthy evidence is reviewed, it must then be weighed by the worker. The worker must determine whether, based on all the evidence presented, the greater weight of the evidence supports the conclusion or persuades the worker that abuse or neglect has occurred or is likely to occur. Or, in the form of a question: Does the proof lead the social worker to conclude that the existence of abuse or neglect is more probable than its nonexistence?

Assessing both the credibility of the evidence as well as the persuasiveness of the evidence are critical to the worker's assessment. The analysis of both of these concepts leads to a conclusion based on the preponderance of the evidence.

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Preponderance of the evidence is a lower standard than clear and convincing evidence, which is the burden required to prove non-delinquency (CHIPS) cases in juvenile court. Therefore, even though there may not be sufficient evidence for a court to find that a child is in need of protection or services, there could be sufficient credible evidence for a worker's finding of "substantiated". Furthermore, because the role of law enforcement and the standard of evidence for criminal conviction (beyond a reasonable doubt) differ from those of child protective services, law enforcement officers may conclude there is not enough evidence on a particular case to pursue charges. Yet the CPS worker may have sufficient evidence on the same case to make a finding of "substantiated."

Substantiation of Physical Abuse

Physical abuse is defined in s. 48.02(1)(a), Stats., as "Physical injury inflicted on a child by other than accidental means." "'Physical injury' includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm as defined under s. 939.22(14)." [Ref. s. 48.02(14g), Stats.]

In order to substantiate physical abuse, a worker must have information that establishes all of the following:

- the child involved is under the age of 18, *and*
- the child has (or had) an injury, *and*
- the injury was inflicted on the child by other than accidental means, *and*
- the injury the child has or had falls within the definition in s.48.02(14g), Stats., *and*
- the determination that abuse has occurred is not "based solely on the fact that the child's parent, guardian or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child." [Ref. s. 48.981(3)(c)4., Stats.]*

Physical abuse does not include self-injury by a child.

Identifying Additional Injuries that Constitute Physical Abuse

The statutory definition of physical injury introduces a list of injuries with the phrase "...includes but is not limited to..." Injuries other than those specifically listed may be considered physical abuse if they are similar in degree or nature to the injuries listed under s. 48.02(14g), Stats. Additional types of injuries do not need to rise to the level of great bodily harm since the listed types of injury do not rise to that level. Substantial bodily harm under s.939.22(38), stats., is a level of harm that falls between "bodily harm" and "great bodily harm". It is defined in the statutes as "bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a temporary loss of

* Note: However, these circumstances may still suggest a referral for a CHIPS petition for necessary treatment, services or care.

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consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.” [Ref. s. 939.22(38), Stats.]

This definition seems more similar to the types of injuries included in the definition of physical injuries that constitute child abuse under s.48.02(14g). However, some of the injuries listed as physical injuries constituting physical abuse are less severe than substantial bodily harm. For example, physical injuries constituting abuse include any lacerations, but the definition of substantial bodily harm includes more severe lacerations requiring stitches.

Determining Whether an Injury is Accidental/Non-Accidental

For an injury to be considered not accidental, it should meet one of the following criteria:

- the person who inflicted the injury had a conscious intent to harm or injure the child, **or**
- the person knowingly, recklessly or carelessly engaged in behavior that resulted in the child being injured, regardless as to whether he or she intended to cause the injuries.

The following are examples of *non-accidental* injuries:

- bruises or welts as described in s.48.02(14g), Stats., that are a result of corporal punishment, even if injuring the child was not the parent’s conscious intent
- brain injuries that are a result of shaken baby syndrome
- a dislocated elbow that is the result of a parent roughly jerking a child about
- an injury as described in s.48.02(14g), Stats., that is sustained by the child when one parent/caregiver attacks the other parent
- an injury as described in s.48.02(14g), Stats., that is sustained when a parent angrily shoves or throws a child aside, even if injuring the child was not the parent’s conscious intent

The following are examples of *accidental* injuries:

- a dislocated elbow that is the result of a parent catching a child to keep him or her from falling
- bruises that result from a child falling as part of normal play
- an injury as described in s.48.02(14g), Stats., that is sustained by the child when the parent slips and falls while carrying the child
- an injury as described in s.48.02(14g), Stats., that is sustained by the child when hit by a softball while playing with a parent

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Recency of Injury

The statutes are silent on how recent an injury must be to fall under the definition of abuse for purposes of reporting, responding, and making a substantiation decision. If the report of alleged abuse is accepted and investigated, the decision to substantiate or not should be based upon all the pertinent information gathered, as it is in all cases.

Substantiation of Neglect

Neglect is defined in s. 48.981(1)(d), Stats., as "failure, refusal or inability on the part of a parent, guardian, legal custodian or other person exercising temporary or permanent control over a child, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child."

In order to substantiate that neglect has occurred, the worker must have information that establishes all of the following:

- the child is under the age of 18, *and*
- the child is not receiving:
 - care,
 - food,
 - clothing,
 - medical or dental care or
 - shelter, *and*
- this care which the child is not receiving is necessary, *and*
- this lack of care seriously endangers the physical health of the child, *and*
- this lack of care is a result of failure, refusal or inability to provide the care, *and*
- the lack of care is not due to poverty, *and*
- the parent, guardian, legal custodian, or other person exercising temporary or permanent control is not providing this care to the child, *and*
- the determination of neglect is not made "based solely on the fact that the child's parent, guardian or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child" [Ref. 48.981(3)(c)4., Stats.]*

Necessary care, as referenced above, includes protection from behaviors that seriously endanger a child's physical health. A caregiver has a responsibility to protect a child not only from dangerous situations or behavior of others, but also from any behaviors of the caregiver himself or herself that present an imminent threat of serious physical harm. Therefore, lack of necessary care includes when a caregiver negligently, recklessly or intentionally commits an act against the child that places the child at substantial risk of harm, i.e., an act that a reasonable person could conclude would logically result in injury as defined in s. 48.02(14g), Stats., regardless of the actual outcome. (If the act resulted in actual injury to the child as defined in sec. 48.02(14g),

* Note: However, these circumstances may still suggest a referral for a CHIPS petition for necessary treatment or care.

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Stats., it would be substantiated as physical abuse.)

The elements set forth above identify each element that needs to be established to support a conclusion that neglect has occurred. Of these elements, the critical and often most difficult issues involve the determination of whether the care in question is necessary and whether the lack of care seriously endangers the physical health of the child.

A determination of necessary care is based upon an assessment of an individual child's needs. For example, a normal 3-year-old needs constant supervision; a normal 13-year-old should be able to handle self-care for periods of time. A determination of conditions or behaviors that seriously endanger a child's physical health should be based upon an assessment of whether the lack of care threatens the child's safety or is likely to cause long-range or permanent impairment.

The following questions can be used by the worker to help determine if neglect is substantiated:

- What does the child need? (Consider age, physical/emotional/social/cognitive development, current physical and emotional condition, etc.)
- What will happen or is likely to happen if the child doesn't have the need met?
- Will the result be seriously injurious or detrimental to the child's physical health? Could it cause long-range or permanent impairment or harm to the child?
- What specific behaviors or pattern of behaviors on the part of the caregiver(s) result in the child not having this need met?
- What specific behaviors or pattern of behaviors on the part of the caregiver(s) present an imminent threat of serious harm to the child?
- What is the serious harm that will result or is likely to result from these behaviors?
- What role if any is the parent assuming in recognizing the child's needs and providing for those needs?

Considerations for Cases with Domestic Violence

Children may suffer serious injury or have their physical health seriously endangered when one adult commits domestic violence against another. Although all children suffer when they are exposed to domestic violence, the presence of domestic violence in the household does not always mean that children are at imminent risk of harm. In situations where a domestic abuser's violence does pose a significant safety threat to the child, a substantiation of neglect against the abuser may be appropriate.

Criteria to use in making this decision may include:

- A child is held during or forcibly exposed to the violence, or restrained from leaving, thereby increasing the likelihood of injury.
- A child is actively intervening in the violence.
- A child is exposed to violent behavior in the home that is increasing in frequency or severity.
- A child is exposed to violence in the home which involves the use of weapons, believable threats of suicide or homicide, or which results in substantial harm to any person present.

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Substantiation of Sexual Abuse

Sexual abuse is defined in s. 48.02(1), Stats., as:

- 1) "Sexual intercourse or sexual contact under s. 940.225, 948.02 or 948.025." [Ref. s.48.02(1)(b), Stats.] Section 940.225, Stats., addresses sexual assault of any person. Section 948.02, Stats., addresses sexual assault of a child, aged 15 years or less. Section 948.025 addresses "engaging in repeated acts of sexual assault of the same child", aged 15 years or less. "Sexual intercourse includes the meaning assigned under s. 939.22(36) as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required." [Ref. s.940.225(5)(c), Stats.].

"Sexual contact" means any of the following:

1. Intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19(1), Stats. [Ref. s.940.225(5)(b)1. and s. 948.01(5)(a), Stats.] "Intimate parts" means the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." [Ref. s.939.22(19)]
2. Intentional penile ejaculation of ejaculate or intentional emission of urine or feces by the defendant upon any part of the body clothed or unclothed of the complainant if that ejaculation or emission is either for the purpose of sexually degrading or sexually humiliating the complainant or for the purpose of sexually arousing or gratifying the defendant." [Ref. s. 940.225(5)(b)2. and s. 948.01(5)(b), Stats.]

In order to substantiate that sexual intercourse or contact constituting abuse occurred, the worker must have information that establishes all of the following:

- the child involved is fifteen years old or less,
or
the child involved was 16 or 17 years old *and* did not freely give consent, was unconscious, was under the influence of an intoxicant to a degree which rendered him or her incapable of appraising the other person's conduct, or was suffering from a mental illness or deficiency which rendered that person temporarily or permanently incapable of appraising the person's conduct,
and
- sexual intercourse as described above occurred,
or

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sexual contact as described above occurred *and* that it was done for the purpose of:

- sexually degrading the child victim, *or*
- sexually humiliating the child victim, *or*
- sexually arousing or gratifying the maltreater, *or*
- the touching contained elements of actual or attempted battery

Sexual contact that is mutual, that occurs with a peer and that is devoid of elements of actual or attempted battery, coercion or exploitation must be Unsubstantiated if the sexual contact is within the range of normal sexual behavior for the child's age or development.

There are two general types of sexual contact and sexual intercourse:

- where a child, male or female, is assaulted or otherwise victimized, exploited or coerced by another person, either an adult or another child
- where a child, male or female, is engaging in mutual sexual activity with a peer, but the child is not old enough to consent under Wisconsin laws

The statutory definitions of sexual abuse are created by cross-referencing certain crimes against children. When they are interpreted, however, they must be interpreted within the legislative purposes of Chapter 48. Section 48.01 (1) states: "In construing this chapter, the best interests of the child...shall always be of paramount consideration. This chapter shall be liberally construed to effectuate the following express legislative purposes:...(ag) To recognize that children have certain basic needs which must be provided for, including the need for adequate food, clothing and shelter; the need to be free from physical, sexual or emotional injury or exploitation; the need to develop physically, mentally and emotionally to their potential; and the need for a safe and permanent family..."

Most of the definitions of sexual crimes against children translate reasonably well for application in Chapter 48. Children who are sexually assaulted or exploited are in need of protection by their families, the child welfare system or the criminal justice system. Sec. 948.02, Stats., however, describes behavior (sexual contact or intercourse with a child under the age of 16) that may not be assaultive, exploitative or coercive. It is written to eliminate consent of the child victim as a potential defense for a criminal defendant. The concept underlying the statute is that children are unfairly susceptible to influence or direction by older persons and persons in a caregiver role and must be protected from such manipulation to engage in sexual activity. The concept of protection from another person does not apply, however, in mutual peer relationships.

As a result, sec. 948.02, Stats., has the effect of potentially defining developmentally normal sexual curiosity and behavior of children as abusive. Sexual behavior is part of normal growth and development and can be seen from birth on. (For guidelines on normal sexual development and behaviors of children, refer to Access Appendix 12: Normal Child Sexual Development.)

Mutual sexual *contact* with a peer that is normal for age/development is generally screened out at Access. Some reports may be screened in for assessment because insufficient information is available at the point of Access to determine that it was mutual and with a peer. If the initial assessment in such cases concludes that there was sexual contact, but that it occurred with a peer,

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that it was mutual, was devoid of elements of actual or attempted battery, coercion and exploitation and was within the range of normal sexual behavior for the child's age or development, the report is Unsubstantiated.

Sexual *intercourse* may also occur with a peer and be mutual. Opinions vary as to whether sexual intercourse in the mid-teens is within the bounds of normal sexual development. However, what distinguishes these situations are the following:

- the relationship is mutual
- there is no one in the victim role and no one in the maltreater role; both are mutual participants
- there are no elements of coercion, exploitation, battery or assault
- the children or child and adult involved are peers

A peer is defined as a person who, in terms of general cognitive development and social role, has equal standing with the child. For example, this can include a 15-year-old and an 18-year-old when they are both in high school. A caregiver or other person who exercises or has exercised temporary or permanent control over a child can never be considered a peer.

Mutual sexual intercourse that meets the above criteria may be substantiated, but is coded as *Mutual sexual activity*. This differentiates those cases from cases of sexual contact or intercourse that occurred and that was not mutual, which must be coded as *Sexual contact/intercourse*.

Substantiation of Sexual Abuse, continued

Sexual abuse is also defined in the statutes as:

1) "A violation of s. 948.05" [Ref. s. 48.02(1)(c), Stats.] This section addresses "sexual exploitation of a child."

In order to substantiate that a violation of s. 948.05, Stats., occurred, the worker must have information that establishes all of the following:

- that the child is under the age of 18, and
- that the child was persuaded, induced, employed, used, enticed or coerced by another person to engage in sexually explicit conduct for the purpose of photographing, filming, videotaping, recording the sounds of or displaying the conduct in any way, or
- that the child was photographed, filmed, or videotaped engaged in sexually explicit conduct or the sounds of that conduct recorded or the conduct displayed in any other way.

2) "Permitting, allowing or encouraging a child to violate s. 944.30". [Ref. s. 48.02(1)(d), Stats.] This section addresses prostitution.

In order to substantiate that a child was allowed to violate s. 944.30, Stats., the worker must have information that establishes all of the following:

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- the child involved is under the age of 18, and
- the child was permitted, allowed or encouraged by another person to engage in prostitution.

3) “A violation of s. 948.055.” [Ref. s. 48.02(1)(e), Stats.] This section addresses intentionally causing a child to view or listen to sexual activity.

In order to substantiate that a violation of s. 948.055, Stats., occurred, the worker must have information that establishes all of the following:

- the child involved is under the age of 18, and
- another person intentionally caused the child to view or listen to sexually explicit conduct, and
- the person did so for the purpose of sexually arousing or gratifying the actor or humiliating or degrading the child.

4) “A violation of s. 948.10”. [Ref. s. 48.02(1)(f), Stats.]. This section addresses exposing the genitals or pubic area to a child or causing a child to expose genitals or pubic area.

In order to substantiate that a violation of s. 948.10, Stats., occurred, the worker must have information that establishes all of the following:

- the child involved is under the age 18, and
- another person caused the child to expose genitals or pubic area or exposed genitals or pubic area to the child, and
- the person did so for the purpose of sexual arousal or sexual gratification, and
- the child was not the defendant’s spouse.

NOTE: There are additional types of sexual crimes against children which are described in Ch. 948, but which are not cross-referenced under s.48.02(1) as abuse. They are still crimes, however, and may be dealt with by the law enforcement and criminal justice system.

Substantiation of Emotional Abuse/Damage

The final form of abuse in s. 48.02, Stats., is “emotional damage for which the child’s parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to obtain the necessary treatment or to take steps to ameliorate the symptoms”. [Ref. s. 48.02(1)(gm), Stats.] It is defined in the statutes in the following way: “‘Emotional damage’ means harm to a child’s psychological or intellectual functioning. ‘Emotional damage’ shall be evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial or observable change in behavior, emotional response or cognition that is not within the normal range for the child’s age and stage of development.” [Ref. s. 48.02(5j), Stats.]

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In order to substantiate this form of abuse, the worker must have information that establishes all of the following:

- the child involved is under the age of 18, and
- the child has suffered harm to his/her psychological or intellectual functioning, and
- that harm is evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.
- the child's parent, guardian or legal custodian has neglected, refused or been unable, for reasons other than poverty, to obtain necessary treatment or to take steps to ameliorate the symptoms.
- "due regard to the culture of the subjects" must be given. [Ref. s. 48.981(3)(c)4., Stats.]

Although it is very helpful to have a psychological or clinical evaluation to substantiate this form of maltreatment, it is not always absolutely necessary. Information about behaviors, emotional response or cognition that is outside the normal range of behavior of children and adolescents may be used to determine whether an allegation of emotional damage is substantiated. A worker's knowledge of child development is important in supporting this conclusion. The worker may also use information about how the child used to function, to determine if there is a "substantial" change. School personnel are generally an excellent source of information in helping to determine how the child used to function and how the child's psychological or intellectual functioning has been impaired.

A case is not substantiated merely because a parent chooses not to follow the treatment recommendations of educational, mental health or other professionals. Parents have a right and responsibility to determine what the needs of their children are. If there is a professional determination that treatment is necessary to remedy the harm and the parent fails to provide it and fails to take steps to ameliorate the symptoms, emotional damage is established.

Substantiating Unborn Child Abuse

Unborn Child Abuse is defined as "serious physical harm inflicted on an unborn child, and the risk of serious physical harm to the child when born, caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree." [Ref. s. 48.02(1)(am), Stats.]

In order to substantiate that unborn child abuse has occurred, the worker must have information that establishes the following:

- serious physical harm was inflicted on an unborn child and there is a risk of serious physical harm to the child when born

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- the serious physical harm or risk of harm was caused by the habitual lack of self-control of the expectant mother of the unborn child in the use of alcohol beverages, controlled substances or controlled substance analogs,
- the habitual lack of self-control in the use of the substances was exhibited to a severe degree

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INITIAL ASSESSMENT APPENDIX 2

Considerations in Maltreater Determinations

***** Draft 8 – January 2006 *****

Maltreatment by Primary Caregivers

In Primary Caregiver cases, the CPS Investigation/Initial Assessment Standards require that the identified child(ren) victim, siblings, parents and alleged maltreater be interviewed by CPS. When harm or the threat of harm is present in a child's family or household, that comprehensive level of interviewing, combined with the application of risk and safety assessment tools, is necessary to determine if a child is in need of protection or services by the child welfare system. It also generally results in a preponderance of the evidence regarding the occurrence of child abuse or neglect and the persons involved.

There may be instances in Primary Caregiver cases where there is sufficient information to determine that a child has been abused, but not to determine the identity of the person responsible, regardless of interviewing that has occurred. An example is where a child too young to communicate has sustained a serious injury, parents have no explanation as to how the injury occurred, and several people had access to the child during the timeframe within which the injury occurred. In these instances, a maltreatment case finding of "Substantiated" should still be made, even though the agency may not know who harmed the child.

Maltreatment by Licensed Secondary Caregivers

The CPS agency may also make a maltreater determination regarding persons providing care in facilities licensed under Chapter 48. Although this determination generally does not serve a direct CPS purpose (determining the protection and service needs of the identified child), it is important to the state licensing and regulatory program. Persons determined to have maltreated a child are prohibited, by law, from caring for vulnerable persons, unless they have passed a rehabilitation review.

The decision as to whether a secondary caregiver in a licensed facility has violated care requirements, as defined by licensing regulations, for a child in that facility is a regulatory decision. It is the responsibility of regulatory agencies to determine whether a person should be allowed to acquire or maintain a license to care for children or other vulnerable persons, absent mandatory licensing bars under the law. The decision as to whether a secondary caregiver in a licensed facility has maltreated a child, as defined in Chapter 948 or Chapter 48, is primarily a law enforcement decision.

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Maltreatment by Other Secondary Caregivers and Non-Caregivers

The CPS Investigation Standards do not require that the CPS agency interview alleged maltreaters in cases of maltreatment by unlicensed secondary caregivers and non-caregivers. The focus of CPS is on supporting the parents in providing protection or services for their child, if needed. Intervention with non-caregivers or unlicensed secondary caregivers who are alleged to have abused or neglected a child is the responsibility of law enforcement agencies. The *Standard for Collaboration with Law Enforcement Agencies on Child Abuse and Neglect Reports* requires that reports of alleged maltreatment by a secondary caregiver or non-caregiver be referred to law enforcement agencies in order to assure that the law enforcement system is able to carry out its responsibilities.

Even though CPS does not interview all involved parties in cases of maltreatment by non-caregivers and unlicensed secondary caregivers, and therefore does not make a maltreater determination, there may clearly be a “preponderance of the evidence” to make a maltreatment determination, i.e. substantiate that maltreatment occurred. In these cases, the record should document that maltreatment has been substantiated and the basis for this decision. Reports gathered from other agencies, such as law enforcement agencies and mental health/AODA agencies, as part of the investigation/initial assessment process may be maintained in the case record. Information from those reports is relevant case history and may be taken into account in future decision making.

CPS Role with Children Who Harm other Children

CPS will also be concerned with whether the aggressor child is exhibiting behavior that creates a suspicion that he or she is residing in a violent or neglectful home environment or has been victimized by another person and is therefore in need of protection or services. It is generally inconsistent with CPS purposes under Ch. 48 to make a formal determination that a child is a maltreater. The juvenile justice system is generally the appropriate system for determining whether a child must be held accountable for abusing another child.

The behavior of such children, however, may prompt the county department to identify them as in need of protection or services, which is consistent with CPS purposes under Ch. 48. In these cases, the record should identify the child and the problematic behaviors and document what occurred, reflecting the county’s assessment and decisions. [Note: This information may continue to be used along with other pertinent information from the family record, to the extent authorized under s.48.981(7), to make appropriate decisions about placement, licensure and certification, if the child’s parents hold or pursue a license/certification to care for other children.]